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**IN THE
COURT OF APPEALS OF INDIANA**

STEVEN L. NEWVILLE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 08A04-0607-CR-355

APPEAL FROM THE CARROLL SUPERIOR COURT
The Honorable Jeffrey R. Smith, Judge
Cause No. 08D01-0508-CM-372

January 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Steven L. Newville appeals his conviction for voyeurism, a Class B misdemeanor. Specifically, Newville contends that the photo array used to identify him was impermissibly suggestive because his photo had a different background than the other photos. Because the eyewitness had ample time to view Newville and expressed certainty in his identification, the photo array did not raise a substantial likelihood of misidentification. We therefore affirm the trial court.

Facts and Procedural History

In 2005, Nathan Hardin lived across the street from Stephanie McKinney in Flora, Indiana, which has a population of approximately 2200. On August 3, 2005, Hardin and his family returned home around 10:00 p.m. after a visit to Indianapolis. Hardin put his children to bed and sat on his kitchen stoop to eat a hot dog. Hardin noticed a man, later identified as Newville, crouching in the flowerbed in front of Stephanie's house and looking into one of her windows. Initially, Hardin did not think anything of it.

Hardin went back inside his house and later looked out his window. He again saw Newville squatted down by Stephanie's window. Stephanie's cat jumped up in the window, at which point Newville ran away from the house. However, Newville soon returned and looked in Stephanie's window for three or four minutes. Newville also crawled on his hands and knees to her front door. At this point, Hardin called the police. He also called Stephanie to tell her what was going on.

While waiting for the police, Hardin saw Newville looking through Stephanie's front door. Newville also appeared to be "pawing," "rubbing," and "smelling" a blanket

that was on a chair on Stephanie's front porch. Tr. p. 57. According to Hardin, Newville then put his hand in his pants and began masturbating. Hardin called the police again to see what was taking so long. When the lights inside Stephanie's house went off, Newville ran off the porch and into the lighted intersection outside of Hardin's house. Hardin could see that Newville had either blonde or gray hair, a short ponytail, and sparse facial hair. Hardin was also able to describe what Newville was wearing. Newville paused in the intersection and then ran away.

Carroll County Sheriff's Deputy Grant Davidson and Flora Police Department Officer Mark Thomas both responded to the call. On his way to the scene, Deputy Davidson saw a suspect riding fast on a mountain bike. Deputy Davidson tried to follow the suspect in his car, but he lost sight of him in an alley. Officer Thomas also tried to find the suspect. Officer Thomas spoke with witnesses who saw the suspect on his bike and reported his direction of travel; however, Officer Thomas did not find the suspect.

The night of August 3 was not the first time Hardin had seen Newville. Hardin had seen Newville two times before in his neighborhood. Hardin estimated that the first time he saw Newville was the night of July 31 and the second time was the night of August 1. The first night, Hardin saw Newville straddling his bike on the sidewalk in front of his house. Newville stood there for several minutes, rode off on his bike, and then returned. This went on for approximately a half hour. The second night Hardin saw Newville standing across the street straddling his bike, looking at Stephanie's house.

On August 4, Deputy Davidson and Officer Thomas showed Hardin a collection of six photos. Officer Thomas had assembled the photo array by taking characteristics of

Newville as described by Hardin and inputting them into a computer, which then selected the photos. The photo array was in a large manila envelope. Officer Thomas asked Hardin to take out the photo array and identify the person he believed he had seen the night before. Hardin “rather quickly” identified Photo Number 2, which was a photo of Newville. *Id.* at 145. The background of Newville’s photo is different from the other photos in the array. Specifically, Newville is standing in front of a structure with wood siding that is painted white, much of which is peeling off. Four of the suspects are standing in front of a yellowish or beige background, and the fifth suspect is standing in front of a white or cream cinder block wall.

The State charged Newville with voyeurism, a Class B misdemeanor. Before trial, Newville filed a Motion to Suppress Identification Evidence on grounds that the photo array was impermissibly suggestive. The trial court denied the motion, stating:

When first viewed by the court with the defendant present, the court had to examine the display to determine which photograph was of the defendant. The defendant’s photograph did not “leap” from the page. Although the background in the photograph of the defendant was different from the back ground [sic] in the other photographs, it was not impermissively [sic] suggestive.

Appellant’s App. p. 2. However, the trial court indicated that it would reconsider the issue at trial. A jury trial was then held, during which Hardin identified Newville as the peeper in court. The trial court revisited the photo array issue and denied Newville’s objection to it. The jury found Newville guilty as charged, and the trial court sentenced him to 180 days with 178 days suspended and probation. Newville now appeals his conviction.

Discussion and Decision

Newville raises one issue on appeal. Specifically, he contends that the trial court erred by admitting the photo array into evidence because it was impermissibly suggestive. The Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is “impermissibly suggestive.” *Williams v. State*, 774 N.E.2d 889, 890 (Ind. 2002). “A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances.” *Id.* A trial court considers the following factors to evaluate the likelihood of a misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; and (4) the level of certainty demonstrated by the witness. *Id.* If the pre-trial identification procedure was unduly suggestive, then the testimony relating to it is inadmissible. *Id.*

Here, the background of Newville’s photo is different from the other five photos.¹ However, the photos depict six remarkably similar individuals, that is, six Caucasian males of similar age, hair color, facial expressions, and all with some facial hair. And as the trial court indicated, the background of Newville’s photo does not “leap” from the page. Appellant’s App. p. 2. In fact, one of the other photos has a different background as well. In addition, the record shows that Hardin had ample time to view Newville.

¹ Newville argues that the structure he is standing in front of in his photo could be Stephanie’s house. *See, e.g.*, Appellant’s Br. p. 11 (“It seems as though Newville’s picture was taken directly at the scene of the crime.”). However, there is no evidence to support this. Moreover, the photo was taken during the daytime. The incident here occurred at nighttime, and Newville was not located that night.

August 3 was the third night in four consecutive days that Hardin had seen Newville in his neighborhood. On the third night, August 3, Hardin had a good view of the side of Newville as well as a view of his front as he ran off Stephanie's porch and paused in the lighted intersection. When shown the photo array, Hardin quickly selected Newville's photo. Although Newville's photo had a different background, given Hardin's opportunity to view Newville on three separate occasions and his level of certainty, the photo array did not "raise[] a substantial likelihood of misidentification." *See Williams*, 774 N.E.2d at 890-91 ("There is no doubt here that the victim spent enough time with Defendant to be able to identify him nine days later. Given the time that the victim and Defendant spent together, it is unlikely that the green tint of Defendant's background [compared with the gray tint of the other backgrounds] would confuse the victim and cause him to identify the wrong person. The trial court did not err by admitting the photo array."). We therefore affirm the trial court.

Affirmed.

BAILEY, J., and BARNES, J., concur.